

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No.373/2010**

% **Date of Decision: 19.10.2010**

Mahanagar Telephone Nigam Ltd. Appellant

Through Mr.R.P.Sharma and Ms.Shreejata
Dutta, Advocates

Versus

Arya Co-operative Housing Society Ltd. Respondent

Through None

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

MOOL CHAND GARG, J. (ORAL)

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CM No. 18266/2010 (delay in re-filing)

For the reasons stated in the application, the delay in re-filing is condoned.

Application stands disposed of.

CM No. 18267/2010 (delay in filing)

For the reasons stated in the application, the delay in filing is condoned.

Application stands disposed of.

CM No.18268/2010 (Exemption)

Allowed subject to just exceptions.

Application stands disposed of.

FAONo. 373/2010

1. This appeal has been filed by the appellant, Mahanagar Telephone Nigam Limited, aggrieved of the order dated 24.4.2010

passed by the Additional District Judge, Rohini Courts, Delhi in Suit No.194/2009, whereby the learned Additional District Judge has dismissed the petition filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1966 to assail the award dated 22.04.2009 passed by the Sole Arbitrator in a lis between the parties which was referred for arbitration by the respondent by invoking the arbitration clause bearing No. 11.1 in the agreement dated 29.03.2001 entered into between the parties, which is a lease deed by which the respondent had agreed to let out to the appellant a space of approximately 65 square metres for the purpose of installation of Base Transmission Receiver Station (BTS) antenna on a monthly rent of ₹23,000/- for a period of five years. Even though it was an agreement executed in writing but the same was not registered. The lease was valid for a period of five years. It also contained a renewal clause. However, the respondent, on the expiry of the period of five years, refused to renew the lease deed and accordingly, informed the appellant to vacate the premises in question after 28.03.2006.

2. On failure on the part of the appellant to do the needful and also to clear the arrears which became due at the relevant time, the respondent invoked the arbitration clause and the matter was referred to Ms.Usha Mehra, retired Judge of Delhi High Court, for adjudication. The parties appeared before the arbitrator and the respondent filed its claim. The appellant refuted the claim and even filed a counter claim, which was refuted by the respondent. On the pleadings of the parties, the following issues were framed by the arbitrator:-

1. Whether after the termination of lease by registered notice dated 04.07.2006, is the claimant entitled to vacant possession of the premises in question?
2. Whether the claimant is entitled to damages as claimed in Claim No.3?

3. Whether the claimant is entitled to interest, if so, on what amount and from what date?
4. Whether the respondent is entitled to counter claim as pleaded in the counter statement of facts?
5. Whether parties are entitled to costs?

3. As regard issue No.1, which is the subject matter of controversy, the arbitrator made the following observations:-

The question for consideration is, whether respondent had any right to seek renewal of the lease on the basis of clause 12.2 of the unregistered lease deed. Contention of the respondent that since claimant agreed for enhanced rent and accepted the enhanced rent, hence lease stood renewed for a further period of five years. This argument, to my mind, is not legally tenable. If a document is compulsory registerable as required under Section 107 of the Transfer of Property Act and has not been registered, then such a document is inadmissible in evidence. Its terms cannot be looked into including the one dealing with renewal clause and the increased rent. No right can be enforced by the respondent of the terms of a unregistered lease. For support reliance can be placed on the decision of Delhi High Court in the matter of "Modern Food Industries (I) Ltd. Vs. I.K. Malik and Ors. [98 (2002) Delhi Law Times 593]". The Apex Court in that case of "DDA Vs. Durga Chand Kaushik [AIR 1973 Supreme Court 2609]" observed that "A renewal of lease is really the grant of a fresh lease. It is called a "renewal" simply because it postulates the existence of a prior lease which generally provides for renewal as of right. IN all other respect, it is really a fresh lease." "Renewal" thus is not a collateral purpose. Hence no advantage can be taken by respondent of clause 12.2 of the unregistered lease. Since lease became a month to month tenancy, the same was terminated by the claimant as per the provision of Section 106 of Transfer of Property Act when it served on respondent registered notice dated 04.07.2006, thereby terminating the tenancy on or after 28.07.2006. The reason terminating the tenancy as

given are (i) BTS is a health hazard to flat owners; (ii) it transmit radiation which causes health problems to occupants of the flats and also create noise pollution. Since the tenancy has been validly terminated, and the respondent has no right of renewal of the same, hence claimant is entitled to its physical vacant possession of the premises in question.

On merits also, claimant made its intention clear that it would not renew the lease and that the respondent should relocate BTS Tower. Respondent through its SDE (BSS-I) NW dated 04.05.2006 vide Ex.RW 1/B assured the claimant that it would vacate the premises and relocate the BTS tower. Assurance was to the effect that MTNL would initiate the process of relocation of said BTS Tower from Society's premises. For that it may take some times due to procedural reason. This assurance was reiterated by the respondent through Sh.S.P.Srivastava, D.E.(BSSI) vide his letter dated 24.05.2006 wherein he said "Refer your e-mail dated 11.05.2006. In this regard please be noted that MTNL is under process of relocating the BTS tower installed at your Society's rooftop." Even in the statement of Defence and in particular para 7 on merits, it is admitted by the respondent that at the relevant time it decided to relocate the said Tower. It was not done because it involved large sum of money. Question is, can a tenant refuse to vacate the premises after expiry of the lease period because relocating involve huge amount. To my mind, answer would be in the negative. BTS tower generate excessive noise pollution. It has been proved on record through testimony of claimant's witnesses as well as documentary evidence i.e. Ex.CW 2/X letter dated 04.11.2006 issued by Mr.P.P.Sharma, DE (BSS-I) wherein he admitted that DG Set would be set right to reduce excess noise level, if any.

4. On that basis, the Arbitrator held that in view of the lease deed being unregistered, the appellant had no right to ask for extension of the lease.

5. Learned Additional District Judge while dealing with the objections filed under Section 34 of the Arbitration and Conciliation

Act upheld the award and dismissed the objections vide order dated 24.04.2010.

6. The central issue, which is the cause of dispute between the parties i.e. the right of renewal of the lease deed on the basis of which the appellant wants extension of lease has been accepted to be rightly decided by the arbitrator. Relevant observations were made by the learned Additional District Judge in paragraph 15 of the impugned order, which is reproduced hereunder for the sake of reference:-

15. Now coming to the merit of the award there are four issues framed in the award. First and fourth issue gone in favour of the respondent (petitioner in award) and second issue in favour of the petitioner (Respondent in award). As far as first issue is concerned Ld. Arbitrator has held that since lease deed is unregistered it cannot be relied in evidence. As renewal clause is not the collateral purpose. Hence, lease deed cannot be renewed and passed the order to vacate the premises. It is settled law that in the absence of registered lease deed tenancy become month to month and therefore same can be terminated after giving notice as per provision of Section 106 of Transfer of Property Act. It is not denied by the petitioner that he has not received notice. Hence, I do not find any infirmity in the order of Ld. Arbitrator. As far as fourth issue which is concerned regarding the dismissal of counter claim, petitioner has sought damages for the loss suffered by it as BTS tower remained unoperational due to the act of the respondent as the respondent did not allow the petitioner to maintain the tower and due to which petitioner could not provide service to the valid subscribers and which resulted in the drop of subscribers. Ld. Arbitrator has rejected the claim on the ground that petitioner has failed to prove that tower remains unoperational or it suffered losses as petitioner has neither placed original documents on record nor examined any witness to sustain the claim. This finding of arbitrator on both the issues are based on appreciation of facts and evidence. It is well settled law that while deciding the petition under Section 34 of the Act the court does not sit as a court of appeal and

appreciate evidence. The jurisdiction is limited to the extent to see whether award is liable to be set aside on any of the ground mentioned in Section 34 of the Act. The Court cannot set aside the findings which is given by the Id. Arbitrator on the basis of merits after appreciation of the facts and evidence. My this view is fortified by the judgment passed by Hon'ble Justice S.N.Dhingra, in case titled as Rakesh Bala Aneja and Others Vs. J.S. Sood and others, OMP No.491/2003 dated 30.10.2009.

7. Making the aforesaid observations, the learned Additional District Judge dismissed the petition as being devoid of any merit.

8. In this appeal, the appellant has tried to raise the similar issues which have been dealt with by the Additional District Judge in accordance with law. Even otherwise, I do not find any infirmity in the award or in the order passed by the learned Additional District Judge inasmuch as it is well-settled that except for collateral terms and conditions in an un-registered lease deed, the other terms and conditions cannot even be read and thus, while the arbitration clause could have been read for collateral purposes, the renewal clause could not. Hence the appeal filed by the appellant is dismissed with no orders as to costs. Trial court record, if any, be sent back forthwith.

MOOL CHAND GARG, J.

OCTOBER 19, 2010

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